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U.S. District Court U. S.  
DISTRICT  
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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM 1942  
No. 627

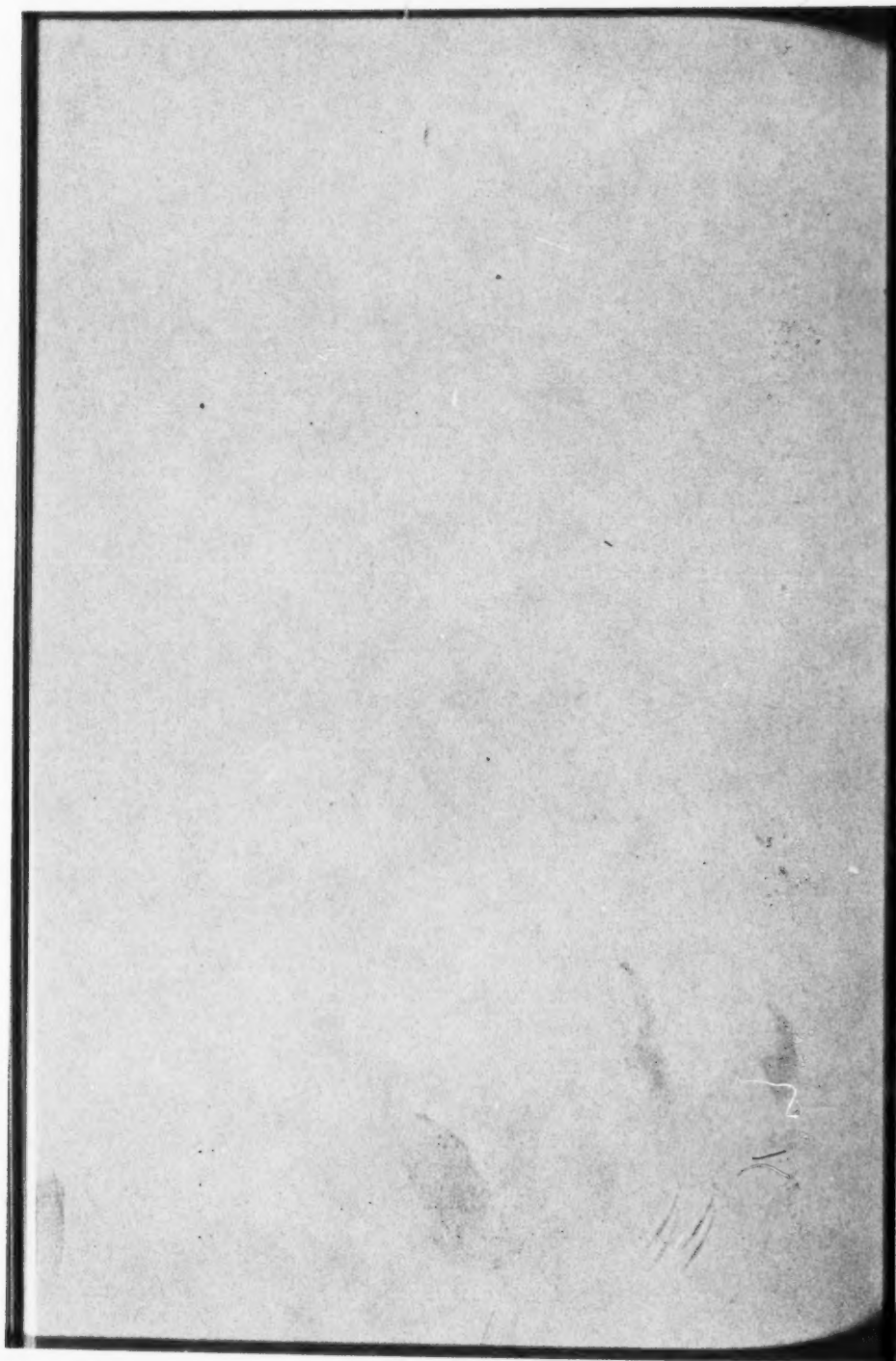
In the Matter of  
**PITTSBURGH TERMINAL COAL CORPORATION,**  
Debtor.

**ALEXANDER GUTTMANN**, Individually and as Chairman of  
the Protective Committee for Preferred Stockholders of  
Pittsburgh Terminal Coal Corporation, **HOWARD S. GUT-**  
**MANN**, **IRENE GUTTMANN**, **RUDOLPH GUTTMANN**, **MOYSES**  
**GUTTMANN** and **ELIZABETH WOLFERS**,  
*Petitioners,*  
against

**PITTSBURGH TERMINAL COAL CORPORATION**, Debtor; **WILLIAM**  
**G. HEINER**, as Trustee of Pittsburgh Terminal Coal Cor-  
poration, Debtor; **UNION TRUST COMPANY OF PITTSBURGH**,  
Successor Trustee for Bondholders of Pittsburgh Ter-  
minal Coal Corporation; **THE PITTSBURGH AND WEST**  
**VIRGINIA RAILWAY COMPANY**; and **NORTH AMERICAN COAL**  
**CORPORATION**,  
*Respondents.*

**PEITION FOR A WRIT OF CERTIORARI TO THE**  
**CIRCUIT COURT OF APPEALS FOR THE THIRD**  
**CIRCUIT AND BRIEF IN SUPPORT THEREOF**

**HARRY HOFFMAN,**  
**ALLEN H. BERKMAN,**  
**SAMUEL MARRON,**  
**NATHAN D. LEIMAN,**  
*Counsel for Petitioners.*



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM 1942

No.

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In the Matter of

PITTSBURGH TERMINAL COAL CORPORATION,  
Debtor.

ALEXANDER GUTTMANN, Individually and as Chairman of  
the Protective Committee for Preferred Stockholders of  
Pittsburgh Terminal Coal Corporation, HOWARD S. GUTT-  
MANN, IRENE GUTTMANN, RUDOLPH GUTTMANN, MONROE  
GUTTMANN and ELIZABETH WOLFERS,

against *Petitioners,*

PITTSBURGH TERMINAL COAL CORPORATION, Debtor; WILLIAM  
G. HEINER, as Trustee of Pittsburgh Terminal Coal Cor-  
poration, Debtor; UNION TRUST COMPANY OF PITTSBURGH,  
Successor Trustee for Bondholders of Pittsburgh Ter-  
minal Coal Corporation; THE PITTSBURGH AND WEST  
VIRGINIA RAILWAY COMPANY; and NORTH AMERICAN COAL  
CORPORATION,

*Respondents.*

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**PETITION FOR A WRIT OF CERTIORARI TO  
THE CIRCUIT COURT OF APPEALS FOR THE  
THIRD CIRCUIT**

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE  
JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

ALEXANDER GUTTMANN, individually and as Chairman of  
the Protective Committee for the Preferred Stockholders  
of Pittsburgh Terminal Coal Corporation, HOWARD S.

GUTTMANN, IRENE GUTTMANN, RUDOLPH GUTTMANN, MONROE GUTTMANN and ELIZABETH WOLFERS respectfully pray for the issuance of a writ of certiorari to review a decision of the Circuit Court of Appeals for the Third Circuit (hereinafter sometimes referred to as the Court Below) made in the above entitled cause on October 13, 1942 (R. p. 81 ; 130 F. [2d] 872). The said decision of the Circuit Court of Appeals affirmed a decision by the United States District Court for the Western District of Pennsylvania (hereinafter sometimes referred to as the District Court) made March 13, 1942, unreported (78a), which upheld a decision of a Referee in Bankruptcy disallowing certain proofs of claim filed by Petitioners (53a; 64a; 66a; 69a).

Copies of said decisions are hereto attached.

## A

### Summary Statement of the Matter Involved

On or about December 4, 1924, a contract of merger and consolidation was entered into by and between the Debtor and Meadow Lands Coal Company, pursuant to the terms of which the present Pittsburgh Terminal Coal Corporation was formed. The said agreement provided, among other things, as follows (39a):

"5. A sinking fund for the protection and gradual retirement of the preferred stock shall be created by the deposit, within thirty days following the termination of each quarter of the calendar year, with a bank or trust company to be designated from time to time by the Board of Directors, (said bank or trust company being hereinafter referred to as the 'Trustee'), of a sum equivalent to 7¢ for each ton of coal mined and removed during the preceding quarterly period from the properties owned by Pittsburgh Terminal Coal Company before its consolidation with Meadow Lands Coal Company. Said sinking fund so created may be invested in the purchase of said preferred stock at a



price not exceeding par in such manner as the Trustee may deem advisable. If unable to purchase said preferred stock at or below par said fund may be invested by the Trustee, upon instruction from the Board of Directors, in either high grade securities or additional coal lands."

Land Title and Trust Company of Philadelphia, Pa., was designated as Trustee of the sinking fund above referred to (40a).

The Debtor issued certificates of Preferred Stock and offered the same for sale to the public.

Claimants are the owners and holders of \$609,400 par value of such certificates. All said certificates of Preferred Stock, including also the certificates of Preferred Stock owned by Petitioners, were all endorsed with the language above quoted.

The annual report of the Debtor as of December 31, 1938 shows that there was outstanding on that day \$3,323,700 par value of 6% Cumulative Preferred Stock.

The Debtor failed to make some of the promised payments into the sinking fund (40a).

On April 19, 1939 Receivers were appointed for the Debtor. On December 4, 1939 a petition for reorganization under Chapter X of the Chandler Act was filed and was approved on January 2, 1940 (1a).

Petitioners, being the holders of Preferred Stock of the Debtor, which Preferred Stock provided for a sinking fund as hereinbefore set forth, filed proofs of claim and amended proofs of claim as creditors (1) for the amount of the full par value thereof, plus accrued dividends, and (2) for satisfaction of the sinking fund provisions hereinbefore referred to (36a; 38a; 47a).

The amended proofs of claim allege that as of December 31, 1938 the arrears in payments into the sinking fund for the Preferred Stock amounted to \$1,290,501.88 and that as of May 31, 1941 the said arrears totaled \$1,418,438.59 (40a). The Referee below (item 4 of his Opinion, 56a) quoted an

amended proof of claim as stating that as of December 31, 1937, the arrears to the sinking fund amounted to \$1,216,088.52 (36a).

Said amended proofs of claim also contained, among others, the following averments (36a):

"12. That at the time of the payments under the said sinking fund agreement the Debtor was fully solvent, and the payments due under said sinking fund agreement could have been made without prejudice to any of the creditors of the debtor corporation; and that such payments would not have reduced the remaining assets of the corporation below an amount sufficient to pay all debts and all liabilities of the corporation as they matured, except such debts and liabilities as have been otherwise and adequately provided for."

These averments were not denied, the case being heard by the Referee as if upon demurrer and upon the objection that the same were insufficient in law (47a; 49a; 51a; 52a; Opinion of Referee, 57a; 63a). The briefs of respondents below expressly admit that (for the purposes of these proceedings at least) the Debtor could have made the payments into the sinking fund at the time they were due without becoming insolvent and without prejudice to the existing rights of creditors and stockholders.

Said claims were disallowed by the Referee (53a; 64a; 66a; 69a) who also denied a trial upon the issue of solvency (63a). Upon petition for review, the District Court, by an order of Hon. R. M. Gibson filed March 13, 1942, dismissed the Petitioners' objections to the Referee's Report and confirmed and sustained the said Report (78a; 79a).

An appeal from the order of the District Court was taken to the Court Below. In a decision of October 13, 1942 the order of the District Court was affirmed.

### The Questions Presented

1. Are the Preferred Stockholders, by virtue of the above quoted provisions contained in the Merger Certificate and endorsed upon the Preferred Stock Certificates themselves, creditors of the Debtor?

If they are creditors, are they creditors either (a) for the amount which should have been paid into the sinking fund up to the date of the filing of the petition for reorganization, or (b) in such amount as would represent 7¢ per ton of coal mined up to the date of the filing of the petition *plus* either (i) 7¢ per ton for each ton of coal mined subsequent to the date of the filing of the petition, or (ii) such an amount as would equal 7¢ per ton upon all the unmined coal at the date of the filing of the petition,—but in no event in excess of the par value or principal amount of their Preferred Stock plus accumulated dividends or interest?

2. Are or were the Preferred Stockholders secured or preferred for such claims either (a) by way of equitable lien or otherwise upon the coal lands, or (b) upon the coal lands and the proceeds thereof in the hands of the Trustee of the Debtor, or (c) both?

3. In the posture of the case before the Referee, the District Court and the Court Below, the solvency of the Debtor and its failure to make the payments into the sinking fund without prejudice to its creditors being undisputed, could the sinking fund provisions have been enforced by the Preferred Stockholders and can they now be so enforced?

4. Were Petitioners entitled to a trial upon the issue of solvency?

5. Does the intervention of the petition for reorganization destroy such rights which had previously accrued? And were Petitioners unconstitutionally deprived of their property by the Courts Below?

### Jurisdiction

The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A. Section 347(a). The mandate of the Circuit Court of Appeals was entered November 12, 1942.

### Statutes Involved

(a) The pertinent provision of the Pennsylvania Business Corporation Law, which was enacted in 1933, is §705 and reads as follows:

"No redemption of shares shall be made which shall reduce the remaining assets of a corporation below an amount sufficient to pay all debts and known liabilities of the corporation as they mature, except such debts and liabilities as have been otherwise adequately provided for."

Pennsylvania Business Corporation Law, Act of 1933, P. L. 364, Art. VII, Sec. 705; 15 P. S. Sec. 2852-705.

(b) The pertinent provisions of §63 of the Bankruptcy Act read in part as follows:

"Debts which may be proved

"Sec. 63a.—Debts of the bankrupt may be proved and allowed against his estate which are founded upon

"(1) A fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition by or against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest;

"(9) Claims for anticipatory breach of contracts, executory in whole or in part, including unexpired leases of real or personal property;"

National Bankruptcy Act, Sec. 63(a), 11 U. S. C. A. Sec. 106(a) (4).

(c) The pertinent portion of the provision of §126 of the Chandler Act provides:

"§126. \* \* \* three or more creditors who have claims against a corporation or its property amounting in the aggregate to \$5,000. or over, liquidated as to amount and not contingent as to liability, \* \* \* may, \* \* \* file a petition under this Chapter."

#### **Constitutional Provisions Involved**

(a) The pertinent portion of the Fifth Amendment to the United States Constitution, 2 U. S. Const. Anno. p. 517, provides:

"No person \* \* \* shall be deprived of \* \* \* property, without due process of law \* \* \* ."

(b) The Pennsylvania Constitution, Article I, Sec. 9, provides:

"Sec. 9. RIGHTS OF ACCUSED IN CRIMINAL PROSECUTIONS. In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land."

(c) The Pennsylvania Constitution, Article I, Sec. 17, provides:

"Sec. 17. EX POST FACTO LAWS, IMPAIRMENT OF CONTRACTS. No ex post facto law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed."

**B****Reasons Relied Upon for the Allowance of the Writ**

The reasons for the granting of a Writ of Certiorari herein are as follows:

1. The Court Below has decided an important question of local law in a way in direct conflict with the applicable local decisions. *Warren v. Queen & Co.*, 240 Pa. 154, 87 Atl. 595 (1913); *Peoples Pittsburgh Trust Co. v. Pittsburgh United Corp.*, 338 Pa. 328, 12 Atl. (2) 430 (1940).

2. The Court Below has decided an important question of Federal law which has not been but should be settled by this Court, and has decided it in a way probably in conflict with the applicable decisions of this Court. *Warren v. King*, 108 U. S. 389 (1883).

3. The Court Below has so far departed from the accepted and usual course of judicial procedure and so far sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision, in that both Courts relied upon the decision in *In re Pittsburgh Terminal Coal Corporation*, 30 Fed. Supp. 106, 109 Fed. (2) 1020, as applicable and controlling, whereas, in fact, said decision is neither applicable nor controlling.

4. The questions presented involve important questions in bankruptcy, and also involve the constitutional rights of Petitioners.

WHEREFORE, your Petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case entitled "In the Matter of Pittsburgh Terminal Coal Corporation, Debtor. Alexander Guttman, Individually, and as Chairman of the Protective Committee for Preferred Stockholders of Pittsburgh Terminal Coal Corporation, Howard S. Guttman, Irene Guttman, Rudolph Guttman, Monroe Guttman and Elizabeth Wolfers, Appellants, No. 7999", and that said final order and decree of the Circuit Court of Appeals may be reversed by this Honorable Court, and that your Petitioners may have such other, further and different relief in the premises as to this Honorable Court may seem just.

New York, N. Y., December 29, 1942.

ALEXANDER GUTTMANN, Individually and  
as Chairman of the Protective Committee  
for Preferred Stockholders of  
Pittsburgh Terminal Coal Corporation,  
HOWARD S. GUTTMANN, IRÈNE GUTTMANN,  
RUDOLPH GUTTMANN, MONROE  
GUTTMANN and ELIZABETH WOLFERS,

By HARRY HOFFMAN,  
Their Counsel.

Of Counsel:

ALLEN H. BERKMAN,  
SAMUEL MARION,  
NATHAN D. LEIMAN.

**Referee's Opinion on Claim of Howard S. Guttman**

Filed by Referee September 11, 1941.

1. Howard S. Guttman filed a proof of claim (Number 262 in this proceeding) on November 18, 1940, an amended proof of claim on July 18, 1941 and another amended proof of claim August 5, 1941. As stated in an order of the Referee filed August 5, 1941, the last amended proof of claim was filed in the place and stead of the original proof of claim and the averment in the last amended proof of claim "that the instruments upon which the debt or liability is founded are attached hereto" refers to certificates attached to the first proof of claim.

2. The claim is for \$19,740. The proof of claim alleges that the consideration of the debt is moneys loaned to the debtor on its written obligations in the nature of certificates of indebtedness. The certificates are attached to the original claim. Each certificate on its face shows the name of the debtor, certifies that White, Weld & Co. is the owner of a named number of shares of the fully paid and non-assessable preferred capital stock of "this Company" of the par value of \$100 each, that a "statement of the preferences, voting powers, restrictions and other provisions governing the six per cent cumulative preferred stock and the common stock of the Company, all of which are fully set forth in the Agreement of Merger and Consolidation (a copy of which is on file at the office of the Transfer Agent) appears on the reverse side" thereof and that the holder "by accepting this certificate, assents to, and becomes bound by, all the provisions therein set forth." On the reverse side of each certificate is endorsed an assignment from White, Weld & Co. to Howard S. Guttman of "Shares of the Capital Stock represented by the within Certificate". There also appear on the reverse side of each certificate paragraphs, which provide, inter alia, that the



holders of the preferred stock shall be entitled to receive, as and when determined and declared by the Board of Directors, dividends at the rate of six per cent per annum, that said dividends shall be cumulative, that in the event of any liquidation or dissolution of the corporation, whether voluntary or involuntary, the holders of the preferred stock shall be entitled to be paid in full, both the par amount of their stock and the dividends accumulated and unpaid thereon, before any amount shall be paid to the holders of the common stock; and a paragraph 5 which reads as follows: "5. A sinking fund for the protection and gradual retirement of the preferred stock shall be created by the deposit, within thirty days following the termination of each quarter of the calendar year, with a bank or trust company to be designated from time to time by the Board of Directors, (said bank or trust company being hereinafter referred to as the 'Trustee'), of a sum equivalent to 7¢ for each ton of coal mined and removed during the preceding quarterly period from the properties owned by Pittsburgh Terminal Coal Company before its consolidation with Meadow Lands Coal Company. Said sinking fund so created may be invested in the purchase of said preferred stock at a price not exceeding par in such a manner as the Trustee may deem advisable. If unable to purchase said preferred stock at or below par said fund may be invested by the Trustee, upon instruction from the Board of Directors, in either high grade securities or additional coal lands."

3. The claimant calculates his claim at the par value of what he calls his certificates of indebtedness, of which he says he holds 120 (there being attached to his proof of claim three certificates calling for an aggregate of 120 shares of stock), which is \$100 each, together with accrued back dividends amounting, according to the original claim, to \$64.50 each, or a total of \$164.50 per certificate, or \$19,740 in all. The amended proof claims the same total

but states the back dividend to be \$70.50 per certificate, which would make an aggregate of \$20,460.

4. The claimant, without limiting his claim, also sets forth the provisions of paragraph 5 above quoted, alleges that the debtor admitted that the sinking fund provided for in that paragraph was in arrears as of December 31, 1937 in the amount of \$1,216,088.52, and claimant claims "as a beneficiary of the trust, a preference for the violation of trust funds to the extent of \$39.97 per certificate of indebtedness," which on the basis of 120 "certificates" aggregates \$4796.40.

5. The amended proof of claim also avers that an action had been commenced prior to the commencement of this proceeding by and on behalf of the preferred stockholders against the debtor and its directors involving among other things the question of the sinking fund provisions endorsed upon the preferred stock which constituted one of the bases for claimant's claim. By stipulation filed August 12, 1941 it appears that the action to which reference is made is civil action Number 845 filed in this court by Rita Crepeau and Irene Guttmann, suing on behalf of Pittsburgh Terminal Coal Corporation, for themselves and for the benefit of all other stockholders of Pittsburgh Terminal Coal Corporation, who may come in and contribute to the costs of this action, complainants, against Pittsburgh Terminal Coal Corporation and more than thirty other defendants. The complaint in that proceeding refers to the provisions of the above quoted paragraph 5 and alleges that the defendants failed to set aside the sum of seven cents per ton on the coal referred to, but contains no prayer for the payment thereof to anybody and merely prays that the defendants account for certain moneys and make payment to Pittsburgh Terminal Coal Corporation. The amended proof of claim also alleged "That at the time of the payments under the said sinking fund agreement the Debtor was fully solvent, and the payments due under said sinking

fund agreement could have been made without prejudice to any of the creditors of the debtor corporation; and that such payments would not have reduced the remaining assets of the corporation below an amount sufficient to pay all debts and all liabilities of the corporation as they matured, except such debts and liabilities as have been otherwise and adequately provided for."

6. Objections to the allowance of the original claim were filed by William G. Heiner, Trustee of the debtor, Robert Beck and North American Coal Corporation, respectively. The order of the referee dated August 5, 1941, which permitted the last amendment to be filed, gave leave to the parties who theretofore filed objections to amend their objections either by controverting or avoiding the new averments of fact contained in said amended proof or by disputing their materiality in law without admitting or denying their verity in fact, without prejudice, in the event such new averments of fact be finally adjudged to be material in law, to the right to file within ten days after such final adjudication further amendments controverting or avoiding such new averments of fact. Separate objections to the amended proof of claim were filed by William G. Heiner, Trustee, and North American Coal Corporation denying the materiality of the new averments of fact without admitting or denying the verity of such new averments. By leave of court granted August 12, 1941 and August 14, 1941 the Pittsburgh & West Virginia Railway Company and The Union Trust Company of Pittsburgh, successor trustee under the mortgage indenture of the debtor, also separately filed objections to the amended proof of claim without admitting or denying the truth of the new averments of fact. The objections to the amended claim reserved the right in the event that the new averments of fact are finally adjudged to be material in law to file further objections controverting or avoiding them. The several objections in substance aver that the claimant is a stockholder and not a creditor, that he is not entitled

to participate in any distribution of the assets of the debtor until all the debts of the debtor have been paid in full, that the certificates upon which the claim is based constitute the claimant a holder of preferred stock and are not certificates of indebtedness and do not evidence a loan, that there is no contract or obligation whereby the debtor undertook to retire or purchase claimant's stock from any moneys deposited or required to be deposited into said sinking fund, or to distribute pro rata to the claimant any moneys deposited or required to be deposited therein, and that there are no trust funds in existence upon which any trust could be impressed for the benefit of the claimant. It is also alleged that a substantial proportion of the claim is barred by the statute of limitations.

#### DISCUSSION.

1. The underlying question in controversy is whether the claimant has the status of a creditor or has nothing more than the status of a stockholder. The proof of claim, as amended, (a) asserts the loan of money on so-called certificates of indebtedness, (b) asserts a claim for the par value of the "certificates" plus unpaid dividends, and (c) asserts, alternatively, a claim for a proportionate share in a so-called trust fund, being the sinking fund promised by the certificates.

2. The instruments upon which the claim is based clearly purport to be certificates of stock ownership and not certificates of indebtedness, and the rights given to claimant by these instruments are given to him merely as a stockholder. If authority for this conclusion be required reference may be made to *Warren v. Queen & Co.*, 240 Pa. 154. The allegations in the proofs of claim that the instruments are certificates of indebtedness and that the consideration of the claim is moneys loaned, are mere expressions of claimant's conclusions rather than averments of fact. There

is no showing of any contract or agreement other than that embodied in the certificate, wherein this case differs from *Browne v. St. Paul Plow Works*, 64 N. W. 66, 64 Minn. 90, and *In re Lehrenkrauss Corp.*, 10 Fed. Supp. 14, cited by claimant. Counsel for claimants in their briefs are silent as to the contention that the claim is based on a loan or on certificates of indebtedness and it appears to have been abandoned.

3. The holder of stock, whether common or preferred, is not a creditor of a corporation but a part owner of its property: *Moy v. Colonial Finance Corp.*, 283 Pa. 223. "Preferred stockholders are members of the corporation, not its creditors. 'Formerly it was a matter of doubt and discussion whether or not a preferred stockholder had any rights as a creditor of the company or was confined to his rights as a stockholder. The law is now clearly settled that a preferred stockholder is not a corporate creditor': *Cook on Corporations*, 8th ed., vol. 1, p. 910, sec. 271." *Mitchell, Rec. of Liberty Clay Products Company*, 291 Pa. 282. A corporation cannot lawfully use its funds to retire preferred stock if creditors would be prejudiced thereby: *Warren v. Queen & Co.*, 240 Pa. 154; *Culver v. Reno Real Estate Co.*, 91 Pa. 367.

4. The claim is primarily for the par value of the stock plus cumulative dividends. By the provisions of paragraph 3 on the reverse side of the stock certificates the stockholder, in the event of any liquidation or dissolution of the corporation, is entitled to the par amount of his stock and the dividends unpaid thereon before any amount shall be paid to the holders of common stock. These provisions manifestly deal with distribution to stockholders by virtue of their being part owners of the corporation's property and do not create a debtor-creditor relationship.

5. The claimant relies chiefly upon his secondary claim, which is based on the sinking fund provision in paragraph 5 appearing on the reverse side of the certificates. That paragraph requires the making of deposits for a sinking fund in the hands of a trustee and authorizes the investment thereof in the purchase of debtor's preferred stock at a price not exceeding par in such manner as the trustee might deem advisable, or if such stock be not obtainable at such a price, directs investment of the fund in securities or coal lands upon instruction from the Board of Directors. If the sinking fund payments were now required to be made the fund would not suffice to pay as much as par value for all the preferred stock. The proof of claim contains no offer to sell or part with claimant's stock for less than par. For that reason, if no other, the claim, in so far as it is for a pro rata share of the amount which ought to be in the sinking fund, could not be allowed.

6. The provisions of paragraph 5 of the stock certificate are wholly consistent with the theory that the preferred stockholders' rights are rights of ownership. The required sinking fund payments are measured by the amount of coal mined, that is, represent a capital asset which has been liquidated in the course of the corporation's operations, and paragraph 5 provides for the application of such assets so as to prevent their distribution as profits. It may be that but for the pendency of the present proceeding the preferred stockholders could bring some sort of action to enforce the provisions of paragraph 5, and if the debtor corporation has assets in excess of what is required to satisfy all its debts, such action might result in a judgment or decree against the corporation for the payment of money to a trustee to be used for the purposes prescribed in paragraph 5. Such a judgment or decree would have the semblance of a debt but it would be merely a device for segregating a part of the corporation's property for the benefit of the corporation's owners. The right to sue for such a segregation does not constitute claimant a creditor.

7. No action to enforce the sinking fund provisions was brought before the commencement of the present proceedings. The civil action, Number 845 in this court, was not such an action.

8. The claim to preference for the violation of trust funds is not tenable because, if for no other reason, the sinking fund was only promised, it was never in existence.

9. Chapter X of the Bankruptcy Act, under which this proceeding is pending, clearly differentiates between stockholders and creditors in Section 106 where it says (emphasis here supplied):

"For the purposes of this chapter, unless inconsistent with the context—

(1) 'claims' shall include all claims of whatever character against a debtor or its property, *except stock*, whether or not such claims are provable under section 63 of this Act and whether secured or unsecured, liquidated or unliquidated, fixed or contingent; \* \* \*

(4) 'creditor' shall mean the holder of any claim;  
\* \* \*

(12) 'stock' shall include membership, shares, and similar interests in a debtor, certificates and other evidences of such membership, shares or interests, and voting-trust certificates;"

It thus appears that while the definition of "claims" is very broad it expressly excepts stock. The reference to section 63, upon which claimant somewhat relies, is subject to the same exception.

10. It is clear that the present claimant has not shown himself to be a creditor within the meaning of Chapter X of the Bankruptcy Act. This conclusion may well be rested upon the ruling of Judge Gibson, affirmed on appeal, to

the effect that holders of preferred stock of the present debtor are not *ipso facto* creditors: In re Pittsburgh Terminal Coal Corp., 30 F. Supp. 108, 109 F. (2d) 1020. The opinion in that case does not expressly refer to the contention, now made, based upon the sinking fund provision, a contention which would have been useless in the former proceeding because under section 126 of the Act a creditor is not eligible to be a petitioning creditor unless his claim is liquidated as to amount and not contingent as to liability. This new contention is not sufficient to distinguish this case from the one ruled by Judge Gibson.

#### CONCLUSION.

It is concluded that the claim must be disallowed as a proof of debt, and that it is unnecessary to determine the disputed question of debtor's ability to provide a sinking fund without prejudice to creditors or the effect, if any, of the statute of limitations.

WATSON B. ADAIR,  
*Referee in Bankruptcy.*

September 11, 1941.



**Referee's Opinion on Claims of Irene Guttman,  
Rudolph Guttman, Monroe Guttman, Elizabeth  
Wolfers and Constituents of Alexander Guttman,  
Chairman of the Protective Committee for Pre-  
ferred Stockholders and Attorney in Fact for  
Certain Holders of Preferred Stock**

Filed by Referee September 11, 1941.

On November 18, 1940, Irene Guttman, Rudolph Guttman, Monroe Guttman and Elizabeth Wolfers filed proofs of claim numbered, respectively, 263, 264, 265 and 267, and some 43 persons collectively, by their attorney in fact Alexander Guttman, Chairman of the Protective Committee for Preferred Stockholders, filed a joint proof of claim, numbered 266. Amendments to each of these claims were filed July 18, 1941 and August 5, 1941. The July 18, 1941 amendment of the claim made by Alexander Guttman as attorney in fact, omitted the names of some of his constituents named in the original claim and included the names of Howard S. Guttman, Irene Guttman, Rudolph Guttman, Monroe Guttman and Elizabeth Wolfers, who filed claims for themselves, but the last amendment filed by him named as claimants the original constituents and no others. Objections to the allowance of the original claims were filed by William G. Heiner, Trustee of the debtor, Robert Beck and North American Coal Corporation, and objections to the claims as last amended were filed by William G. Heiner, Trustee, North American Coal Corporation, The Union Trust Company of Pittsburgh, successor trustee under a mortgage indenture, and the Pittsburgh & West Virginia Railway Company. The last amended proofs of claim filed by Irene Guttman and by the joint claimants represented by Alexander Guttman, attorney in fact, followed closely the pattern of the last amended proof of claim filed by Howard S. Guttman respecting which an opinion was filed today. The proofs of claim of Rudolph

Guttman, Monroe Guttman and Elizabeth Wolfers have a somewhat different pattern but they, as well as the others, are like the proof of claim of Howard S. Guttman in that they are all based on like certificates of the same class of preferred stock in the debtor corporation and include the claims for the par value of the stock plus accumulated dividends and for a share of the sinking fund contemplated by paragraph 5 of the provisions on the backs of the stock certificates. The last amended proofs of claim show some changes in amounts claimed, but the changes appear unimportant in view of the conclusion hereinafter stated.

The reasoning of the opinion respecting the claim of Howard S. Guttman and the conclusions therein reached apply equally to the claims of Irene Guttman, Rudolph Guttman, Monroe Guttman, Elizabeth Wolfers and the joint claimants represented by Alexander Guttman, all of which proofs of claim will therefore be disallowed.

WATSON B. ADAIR,  
*Referee in Bankruptcy.*

September 11, 1941.

**Memorandum and Order of District Court**

Filed March 13, 1942.

**MEMORANDUM.**

GIBSON, District Judge.

Howard S. Guttman, Irene Guttman, Rudolph Guttman, Monroe Guttman, Elizabeth Wolfers and Alexander Guttman, in his own right and as Chairman of a Committee of Preferred Stockholders, have caused to be certified for review orders of the Referee wherein he refused to allow the claims of such persons as creditors of the Debtor. The subject matter of the review is fully set forth in his opinion filed upon the claim of Howard S. Guttman. All others joining in the request for review are substantially of the same status as Howard S. Guttman.

The Referee's opinion fully reflects the views of the court, which therefore adopts it, and will enter an order sustaining its rejection of the claims of above named persons who have sought review.

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**ORDER.**

And now, to wit, March 13, 1942, the orders of the Referee, dated September 12, 1941, wherein said Referee denied the claims filed respectively by Howard S. Guttman, Irene Guttman, Rudolph Guttman, Monroe Guttman, Elizabeth Wolfers and Alexander Guttman, in his own right and as Chairman of a Protective Committee for Preferred Stockholders and attorney-in-fact for 43 Preferred Stockholders, having come on to be heard upon Review, upon consideration thereof, it is ordered, adjudged and decreed that exceptions and objections to each of said orders be, and the same are, dismissed, and that each of said orders be, and the same hereby is, confirmed and sustained.

R. M. GIBSON,  
*District Judge.*

**Opinion of the Circuit Court of Appeals**

IN THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE THIRD CIRCUIT

No. 7999. October Term, 1942.

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In the Matter of

PITTSBURGH TERMINAL COAL CORPORATION, Debtor.

ALEXANDER GUTTMANN, Individually and as Chairman of  
the Protective Committee for Preferred Stockholders of  
Pittsburgh Terminal Coal Corporation, HOWARD S.  
GUTTMANN, IRENE GUTTMANN, RUDOLPH GUTTMANN,  
MONROE GUTTMANN and ELIZABETH WOLFERS, Appellants.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

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Before MARIS and JONES, *Circuit Judges*, and  
AVIS, *District Judge*.

PER CURIAM.

The questions raised upon this appeal were ruled by this court in a prior appeal in this cause, *In the Matter of Pittsburgh Terminal Coal Corporation, Debtor; Rita Crepeau et al., Appellants*, 109 F. 2d 1020, affirming a prior order of the district court, 30 F. Supp. 106. Upon the authority of that case the order of the district court now appealed from is affirmed.

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